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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970

Misc. No. ~~6158~~ 70-5045

DONALD and EDNA LINDSEY, and
ALL Other Persons Similarly Situated,

Appellants,

vs.

DOROTHEA M. NORMET, HONORABLE WILLIAM C. BEERS, In His Capacity as Judge of the District Court of the State of Oregon for the County of Multnomah; and ALL PERSONS SIMILARLY SITUATED HOLDING OFFICE AS JUDGES OF THE DISTRICT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH,

Appellees.

On Appeal From a Judgment of the
U. S. District Court of Oregon
and Numbered Therein as Civ. No. 70-8

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF UNDER RULE 42 IN LINDSEY V. NORMET, MISC. NO. 6158, AND AMICUS CURIAE BRIEF

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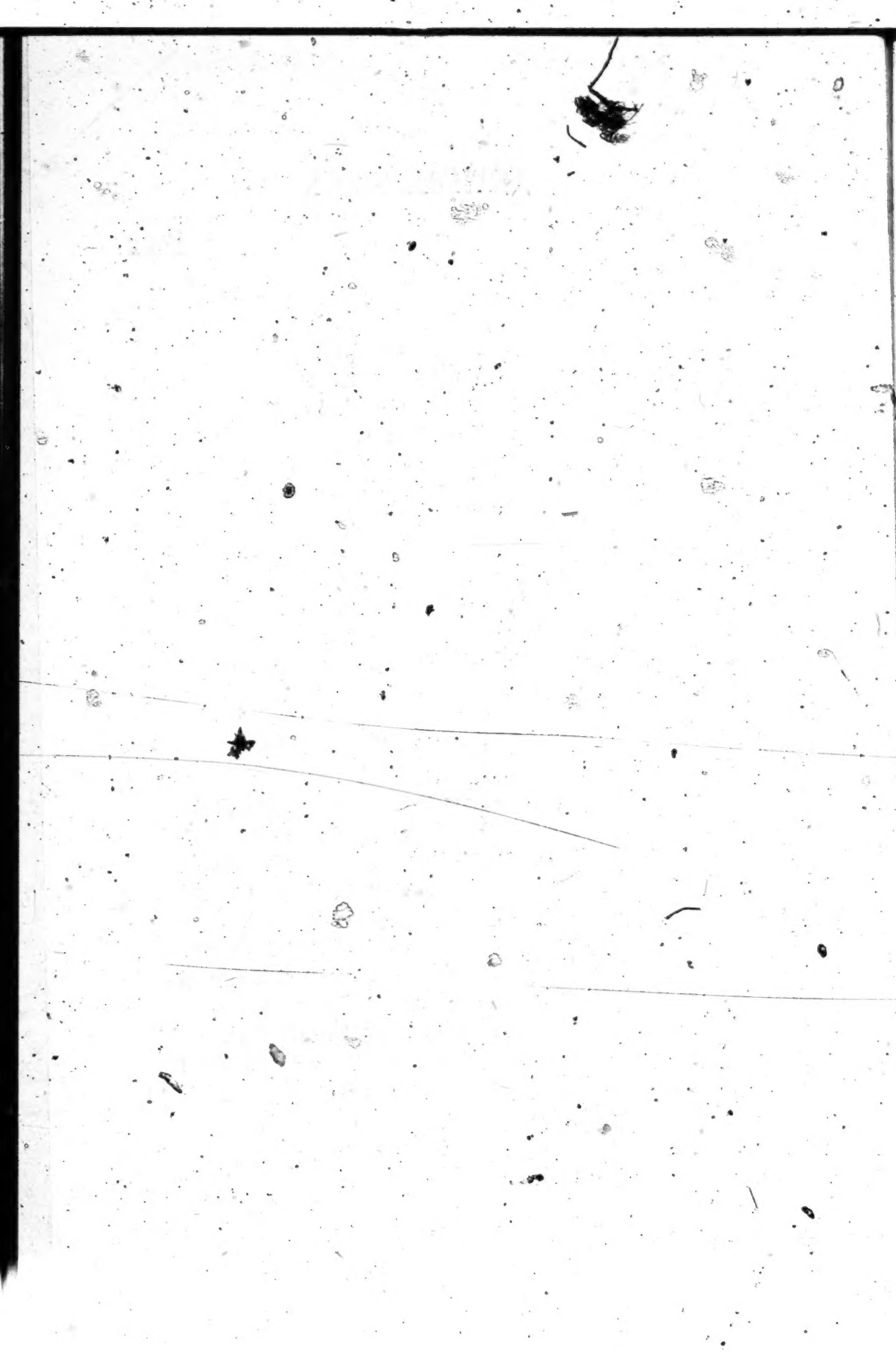

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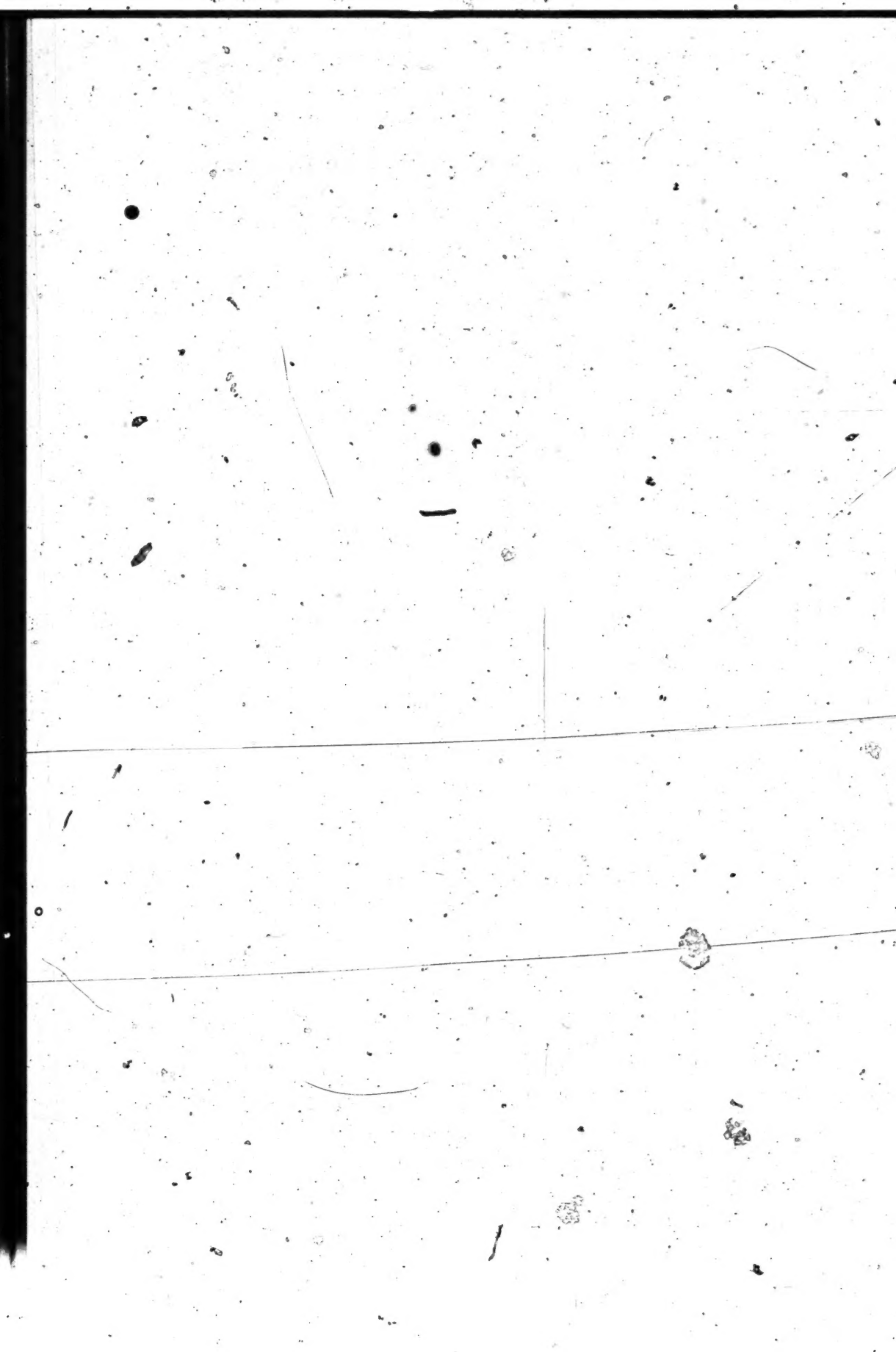

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IN THE
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Appellees.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF UNDER RULE 42 IN CASE OF LINDSEY V. NORMET, MISC. NO. 6158; OCTOBER 1970 TERM

Pursuant to Rule 42 of the United States Supreme Court, the Western Center on Law and Poverty respectfully requests this Court to grant leave to file an amicus curiae brief herein on behalf of Appellants.

The Western Center on Law and Poverty is funded by the Office of Economic Opportunity to provide research, appellate and back-up services to legal services programs in Southern California. Because of its purpose, the Western Center has done extensive research on, and has extensive practical experience with, many of the issues presented by this case. The Western Center also represents many persons who are affected by California statutes which are similar to certain Oregon statutes under consideration herein. Thus, the Western Center would be remiss in its duty to its clients if it did not seek to present this amicus brief.

The amicus brief presented herewith consists of two parts. The first part analyzes the constitutionality of those Oregon statutes under consideration herein which are similar to California statutes. These are, specifically, Oreg. Rev. Stat. §105. 135 and to a lesser extent, Oreg. Rev. Stat. §§105. 125 and 105. 140. While the ruling of this Court in this case will not directly determine the propriety of the analogous California statutes, the ruling is likely to have substantial impact on future litigation concerning such statutes. This is particularly so in that this Court has not previously decided, specifically, the constitutionality of any summary eviction procedures. Further, inasmuch as California is the nation's most populous jurisdiction, its courts have had occasion to pass on many aspects (including constitutional aspects) of landlord-tenant relations. Mr. Justice Harlan, concurring in the dismissal of writ of certiorari as

improvidently granted in Triangle Improvement Council v. Ritchie (on May 17, 1971, Docket No. 712 of October, 1970 term), 39 Law Week 4596, observed as follows:

> "To render a determination upon such a wide-ranging issue we should, at a minimum, have the benefit of the thinking of the lower federal courts on this problem, as well as some knowledge of the responses of the various affected agencies to this new statute. Yet we are entirely without these essential aids." (39 Law Week at 4597.)

The thinking of the California courts on some of the issues presented (see, for example, Mendoza v. Small Claims Court (1958), 49 Cal. 2d 668, 321 P. 2d 9, discussed infra) provides an aid which is analogous to those referred to by Mr. Justice Harlan. This is particularly so in that California courts as State courts, have plenary jurisdiction over all aspects of landlord-tenant law, not just the constitutional aspects, and thus are in a good position to be familiar with the various problems involved and their interrelation. This amicus, with a day to day familiarity with California law, is in a much better position to marshal the relevant California decisions to assist this Court than are attorneys practicing in Oregon. Thus, the brief submitted herewith will supplement, not merely duplicate, those submitted by the parties.

The second part of the amicus brief submitted herewith will acquaint the Court with relevant provisions of California law. If the Court in ruling on the merits of this case is aware of similar laws in other jurisdictions, it will be better able to assess and control the consequences of its decision in this case and thus avoid framing the decision either more broadly or more narrowly than intended. This amicus, because of its familiarity with California law, is able to provide a succinct summary of such relevant California law.

This amicus has contacted respondents herein setting forth the reasons why this amicus wishes to file this brief. Respondent Beers has given his written consent to the filing of this brief. However, respondent Normet has withheld consent, thus necessitating that this motion be submitted.

Respectfully submitted,

PAUL L. McKASKLE

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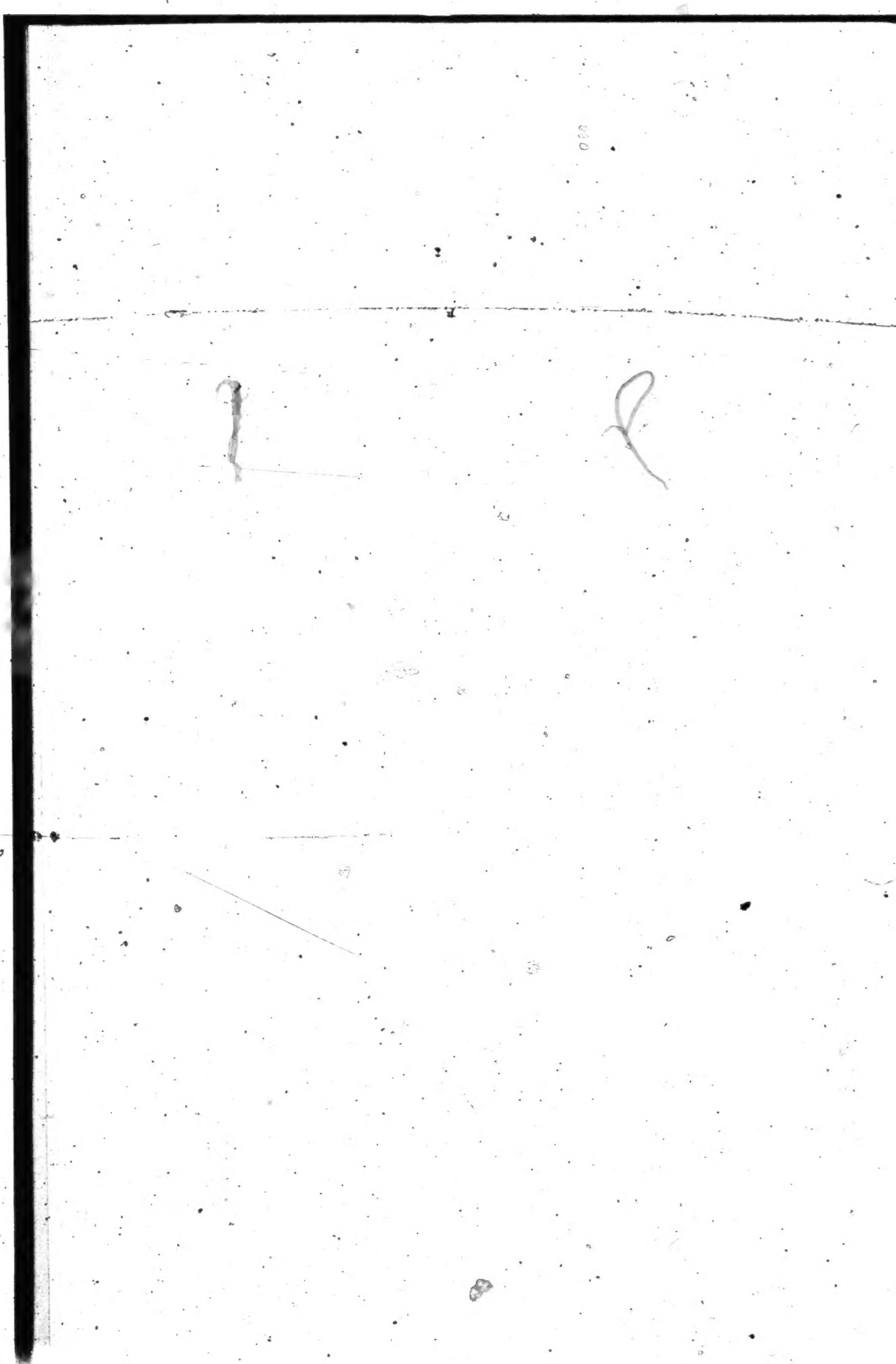
Appellees.

AMICUS CURIAE BRIEF

Amicus, as noted in its motion for leave to file this brief herein, wishes to discuss two major points involved in this case.

First, it supports the appellants' position that the Oregon eviction law is unconstitutional in that it provides inadequate time to prepare for trial. A person may be required to litigate his right to possession to specified property with as little as two days' notice from pendency of action to trial resulting in a final judgment. (See Oreg.



Rev. Stat. §105.135.) The problem is compounded by the inadequate nature of the complaint -- constituting little more than notice that an action is pending (see Oreg. Rev. Stat. §105.125) and the severe limitations imposed on continuances (see Oreg. Rev. Stat. §105.140). For the reasons detailed in the brief herein, the amount of time permitted a tenant to seek counsel and prepare for trial is simply not sufficient to allow for preparation of an adequate defense on the merits.

Second, amicus wishes to provide a brief summary of California eviction procedure. The decision in this case is likely to have impact on eviction procedures in most states (including California). A summary of relevant California law may aid the Court in gauging the impact of its decision, so that it is neither unduly broad or narrow. The inclusion herein of this summary is not, however, intended to suggest that the Court rule directly on any aspect of California law.

I

THE OREGON EVICTION STATUTES PERTAINING TO NOTICE OF TRIAL AND TIME TO PREPARE FOR TRIAL ARE UNCONSTITUTIONAL.

A. PRELIMINARY COMMENT

The three-judge court in Lindsey v. Normet (D. C. Oreg. 1970) Civ. No. 70-8 ruled on five challenges to the Oregon eviction statutes.[1] These were (1) inadequate notice, (2) unreasonably short time for trial, (3) cash security required to obtain a continuance, (4) failure to allow defenses in an eviction action which are allowed in other actions and (5) bond requirements pending appeal.[2] (See Mimeograph Opinion -- Appendix A of the Jurisdictional Statement herein -- pp. 3-7.) This amicus is particularly concerned with the second of these problems -- the provision of an unreasonably short time for trial -- because of the existence of a similar problem in

1 Eviction statutes are referred to by various names in various states. In Oregon, the term F. E. D. (forcible entry and detainer) is used. In California, the term "unlawful detainer" is used. For clarity, the generic term eviction will be used herein.

2 The opinion (Mimeograph, page 7) also refers to three other problems but does not state what they are.

California.[3] However, the analysis herein presented will comment to some degree on the problems of inadequate notice and to a lesser degree with cash security to obtain a continuance and the failure to allow defenses allowed in non-possessary actions -- all of which bear on the adequacy of the time allowed for a trial.[4]

The Oregon eviction statutes which regulate the setting of trials are Oreg. Rev. Stat. §§105.135 and 105.140[5] which provide:

> "105.135. Service and return of summons. The summons shall be served and returned as in other actions. The service shall be not less than two or more than four days before the day of trial appointed by the court.

---

3 Calif. Code Civ. Proc. §1166 provides for three days within which to answer a summons or complaint in eviction cases.

4 The problem of requiring a bond for appeal will not be discussed herein because there is no analogous provision in California, and amicus cannot contribute any meaningful additional analysis. The bond requirement would, however, appear on its face to pose serious constitutional problems.

5 The text of these and other relevant Oregon statutes are set out as Appendix D of the Jurisdictional statement in this action.

"105.140. Continuance. No continuance shall be granted for a longer period than two days unless the defendant applying therefor gives an undertaking to the adverse party with good and sufficient security, to be approved by the court, conditioned for the payment of the rent that may accrue if judgment is rendered against the defendant."

Thus, a tenant against whom a landlord wishes to proceed must be prepared for, and actually commence trial, in as short a time as two days after receiving notice that a complaint has been filed.

The three-judge court, in its opinion (Mimeograph Opinion -- Appendix A to the Jurisdictional Statement at p. 5) held that:

". . . a tenant knows in most cases whether or not he has paid his rent, and, if not, why not. The tenant would not be any wiser if the law were to be rewritten to give him ten days' notice. We find nothing unconstitutional in the statutory time element."

Amicus submits that the determination of the court below is erroneous. The conclusion that the "statutory time element" is not unconstitutional ignores the principles of procedural due process which have been set out repeatedly by the Supreme Court. The reason for the conclusion -- that the tenant

ordinarily knows whether rent has been paid -- ignores the salient issue, which is that the tenant must be prepared to disprove the landlord's allegations at a trial, and that numerous factual problems exist in even an "ordinary" eviction case.

Moreover, the requirement that a trial be held within as little as two days from service applies where the grounds for eviction are, for example, that the tenant is "holding contrary to any condition or covenant of the lease . . . ." (Oreg. Rev. Stat. §105.115[2]), grounds which clearly involve issues and matters of proof more difficult than simply whether or not rent has been paid.[6]

Indeed, the decision below appears to suggest that the filing of an eviction action is evidence that the tenant is wrong, and that therefore justice is served by allowing the landlord to evict as rapidly as possible. This would be, in essence, a predermination of the case before trial.

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6 Other grounds for eviction not involving the question of payment of rent are holding over by the tenant after the lease has expired, without any written lease, or after a notice to quit. (Oreg. Rev. Stat. §105.115[2].)

B. THE REQUIREMENT THAT A DEFENDANT IN AN EVICTION PROCEEDING GO TO TRIAL WITHIN TWO TO FOUR DAYS AFTER SERVICE OF THE COMPLAINT DOES NOT GIVE SUCH DEFENDANT A REASONABLE OPPORTUNITY TO PREPARE A DEFENSE AND THEREFORE DENIES HIM DUE PROCESS OF LAW.

1. A Defendant in an Eviction Proceeding May Not Be Deprived of His Possessory Interest Unless He Is Afforded Procedural Due Process.

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of property without due process of law. The right of a tenant to possession of property has been held to be a right protected by the due process clause. (Mendoza v. Small Claims Court [1958], 49 Cal. 2d 668, 672-73, 321 P. 2d 9; Mihans v. Municipal Court [1970], 7 Cal. App. 3d 479, 484-85, 87 Cal. Rptr. 17. See Sniadach v. Family Finance Corp. [1967], 395 U. S. 337; Lawson v. Featherston [1970], 44 Wisc. 2d 712, 172 N. W. 2d 20.)

2. Procedural Due Process Requires Notice Reasonably Calculated, Under All the Circumstances, to Apprise Interested Parties of the Action and Afford Them an Opportunity to Present Their Objections.

The very foundation of procedural due process is reasonable notice of a pending action. This principle has been reiterated in numerous court decisions concerning the requisites of procedural due process. In the leading case, Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, the United States Supreme Court outlined with great clarity the fundamental requirements of procedural due process..

> "An elementary and fundamental requirement of due process in any proceeding which is to be afforded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . ." (Id., at p. 314 [citations

omitted].)[7]

More recently in the case of In re Gault (1967), 387 U.S. 1, the Supreme Court once more emphasized that mere notice is insufficient unless it affords the defendant time to prepare.

> "Notice to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded . . . ." (Id., at p. 33.)

Even though dissenting from certain portions of the Gault decision, Justice Harlan agreed with the principle set out in the foregoing quote:

> "The Court has consistently made it plain that adequate and timely notice is the fulcrum of due process, whatever the purposes of the hearings. See, e.g., Roller v. Holly . . . ." (387 U.S. at p. 73 [Harlan, J. concurring and dissenting].)

The decided cases make clear that notice is not reasonably calculated to afford the defendant the required opportunity as a matter of law where it is likely in a significant portion of cases

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7 Accord: Armstrong v. Manzo (1965), 380 U.S. 545, 549-50; Mendoza v. Small Claims Court, supra, 49 Cal.2d 668, 672-73; Estate of Reed (1968), 259 Cal.App.2d 14, 20-22, 66 Cal.Rptr. 193; Mihans v. Municipal Court, supra, 7 Cal.App.3d 479, 484-85.

that the defendant will be unable to respond in the time allotted. (Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. 306.) That is, notice is not adequate even though some defendants in some circumstances may be able to comply. What is required to meet the test established in Mullane is notice reasonably calculated, under all the circumstances, to afford an opportunity to respond. This principle is illustrated by another of the leading Supreme Court cases, Roller v. Holly (1900), 176 U.S. 398.[8] In Roller, a summons issued in Texas allowing but five days to appear was served on a party located in Virginia. (176 U.S. at pp. 401-402.) The court held that the defendant was denied due process of law because the notice did not allow sufficient time to make an adequate appearance. (176 U.S. at pp. 408-13.) The Court reasoned:

> "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of law to which no citation of authority would give additional weight; but upon the question of the length of such notice, there is a singular dearth of judicial decision.

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8 Roller was cited with approval in In re Gault, supra, 387 U.S. 1, 78 (Harlan, J. concurring and dissenting); Armstrong v. Manzo, supra, 380 U.S. 545, 550; Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. 306, 314; Roberts v. Jacob (1908), 154 Cal. 307, 309, 97 Pac. 671, affirmed 223 U.S. 261.

> It is manifest that the requirement of notice would be of no value whatever unless such notice were reasonable and adequate for the purpose . . . . What shall be deemed reasonable notice admits of considerable doubt. In the case of a witness subpoena, the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to court with the utmost dispatch, or at least present himself upon the return day of the writ. An ordinary summons, however, to answer the suit of a private individual, contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defense."
> (176 U.S. at p. 409 [citations omitted].)

It is important to note that the Court did not premise its finding of the inadequacy of the notice on the defendant's actual inability to appear. Rather, the Court relied on contingencies which might in some circumstances make it impossible for a given defendant to appear.

> "In the case under consideration, it is admitted that the defendant was served with notice on December 30, 1890, at Harrisonburg, Rockingham county, Virginia, to appear on January 5, 1891, at Groesbeck, Limestone county, Texas; that it

> would have required four days of constant traveling to reach Groesbeck, giving the plaintiff but one day, and that a Sunday, to make preparations to comply with the exigencies of the notice. This estimate, too, makes no allowance for accidental delays in transit." (176 U. S. at pp. 408-09.)

In addition the Court rejected the argument that the default of the defendant would in all likelihood be set aside under the circumstances.

> "Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion -- a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest on a basis more substantial than favor or discretion." (176 U. S. at pp. 408-09.)

In Hyman v. Ross (1948), 84 N. Y. Supp. 2d 102, a New York procedure providing six days to respond to a mechanic's lien foreclosure was held to provide insufficient notice to a defendant served in Illinois.[9] The court

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9 Accord: Robins v. Robert Lawrence Electronics (1948), 84 N. Y. Supp. 2d 99; see Finn v. Chase National Bank (1941), 176 Misc. 127, 26 N. Y. S. 2d 771.

took specific notice of the vast improvement in technology and transportation since the decision in Roller -- Illinois was by 1948 but an overnight train ride or even a shorter plane trip from New York and telephone communication was virtually instantaneous -- but still held six days to answer to be constitutionally inadequate.

Similarly, in McCullough v. Terzian (1970), 2 Cal. 3d 647, 653-55, 87 Cal. Rptr. 195, 470 P. 2d 4, the California Supreme Court held that three days' notice of an informal hearing to contest the termination of welfare benefits was inadequate and denied recipients procedural due process. It should be noted that an informal welfare hearing may involve even less preparation than a formal trial in even a simple eviction action -- particularly in view of liberal evidentiary standards in administrative procedures and the lack of a need to draft and type a formal responsive pleading such as an answer.

Thus, the rules laid down in Roller and Mullane were that notice is constitutionally inadequate if it is not reasonably calculated to provide a defendant sufficient time in most circumstances to take appropriate steps to prepare and present his defenses. It is not enough that it would not be impossible, provided no difficulties were encountered, for some defendants in some circumstances to appear.

3. The Two to Four Days Permitted Defendants By Oregon Law to Prepare For Trial in Eviction Proceedings Does Not Afford a Reasonable Opportunity to Contest the Issues Presented.

At the outset it must be observed that the Oregon statute governing the setting of eviction actions permits a landlord to cause the trial to be held two days after service of the complaint by simply avoiding service on an earlier date. Thus, no tenant in Oregon has a statutory right to more than two days' notice.[10] Two days' notice or (for that matter, even four days' notice) is not, in view of the principles set forth above, notice reasonably calculated to afford eviction case defendants a

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10 While a landlord may choose to serve the complaint so as to allow four days to prepare, there is no compulsion requiring him to do so. Similarily, under Oreg. Rev. Stat. §105.140, the court has discretion to grant an additional two days' continuance. Even so, as a matter of right, the tenant has no more than two days to appear. Roller v. Holly, supra, 176 U.S. at pp. 408-09 makes it clear that due process is measured by what a citizen has a right to receive, not what he may receive by favor or discretion. Thus, the Oregon procedure must be tested as to its constitutionality by the two-day period of notice permitted by right.

realistic opportunity to defend an action.

(a) The Tenant Is Not Afforded Adequate Opportunity to Attempt to Locate Counsel to Help in the Defense of the Action.

The first problem faced by a defendant in an Oregon eviction action following service of the complaint is to attempt to locate an attorney. For the unsophisticated tenant who may never have required legal services, this may prove to be a time consuming process even if employment or other daily obligations do not prevent him from commencing the search immediately.[11] Even assuming a defendant can locate an attorney immediately, he then must secure an appointment. Where the attorney contacted has a busy calendar, particularly if he is employed by a legal services program, it may well be impossible for the attorney to schedule an appointment within the limited time permitted by

11 Compare Roller v. Holly, supra, 176 U. S. 398, 409: "an ordinary summons . . . to answer suit of a private individual contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel . . . ."

Oreg. Rev. Stat. §105.135.[12] Further, the attorney may be otherwise engaged on the time and date (by then, perhaps less than two days hence) set for trial. Assuming that the defendant locates and is interviewed by an available attorney before the trial date, the attorney must obtain the necessary factual information to permit an evaluation of the case. His evaluation is severely impeded by the extremely cryptic material allegations in the landlord's complaint.[13] If there is a meritorious case he

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12 It should be pointed out that a reasonable and prudent man of limited means faced with a trial in two to four days might well conclude that the chances of finding an attorney are so slight that he should devote the limited time available to seeking new quarters for his family even though he has a defense to the action. Such individuals would not, of course, come to the attention of an attorney.

13 See Oreg. Rev. Stat. §105.125. A complaint is sufficient if it alleges:

"(1) A description of the premises with convenient certainty;

"(2) That the defendant is in possession of the premises;

"(3) That he entered upon the premises with force or unlawfully holds the premises with force; and

"(4) That the plaintiff is entitled to the possession of the premises."

(Cont'd)

must then draft and have typed a responsive pleading and collect the relevant evidence.

(b) The Tenant Is Not Afforded Adequate Opportunity to Prepare a Defense to Even the Prima Facie Showing Required by the Landlord.

The court below appeared to assume that the only relevant information that a tenant needs to go to trial is "knowledge" as to whether his rent was paid. However, Oreg. Rev. Stat. §105.125(3) requires that the landlord allege, with respect to the grounds for eviction, only that the tenant "entered upon the premises with force

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13 (Continued)

While a complaint which, in essence, gives only notice that an eviction action is pending might not be unconstitutional in situations where ample time to investigate the case (including by way of discovery) is afforded, the constitutionality of Oreg. Rev. Stat. §105.125 is questionable in the context of Oregon eviction law procedures. The Mullane case, supra, is clear that: "The notice must be of such a nature as reasonably to convey the required information . . ." (339 U.S. at 314) and in view of the short time limits involved herein, pure 'notice pleading' is obviously not of such a nature.

or unlawfully holds the premises with force;" thus, the tenant who "knows" that he has paid the rent must determine in what other manner, if any, he is unlawfully holding the premises (as defined in Oreg. Rev. Stat. §105.115). Other fact issues which may be involved under Oreg. Rev. Stat. §105.115 include (1) Is there a lease? (2) If there is a lease, when does the lease expire? (3) Is a notice to quit required, and has it been given? (4) Is the tenant holding contrary to a condition or covenant? (5) Is the plaintiff the person entitled to possession of the property pursuant to such a summary remedy?[14]

Assuming, however, that the tenant somehow knows the landlord's claim to right to possession is nonpayment of rent, even this one issue may involve considerable preparation. For example, if the rent was paid by money order or third party check and no receipt obtained, it would usually take several days to obtain the cancelled money order or

14 See, for example, California cases such as Francis v. West Virginia Oil Co. (1917), 174 Cal. 168, 162 Pac. 394; Fredericksen v. McCosker (1956), 143 Cal. App. 2d 114, 299 P. 2d 908, where attempts were made to use eviction actions to obtain the results of a quiet title action.

check from the bank or third party.[15] While the tenant can testify that he paid the rent, physical evidence of a cancelled check or money order is immensely more persuasive. The time allowed a tenant before trial virtually precludes the possibility that the tenant (or his lawyer) can obtain such evidence. As another example, the tenant may know of witnesses who can corroborate his testimony as to payment of rent (or, in eviction cases founded upon Oreg. Rev. Stat. §105.115(2), the lack of service of a notice to quit, the terms of an oral lease, whether a covenant has in fact been breached, or other relevant facts). In the time permitted for trial, it is likely to be difficult to locate and interview these witnesses, let alone obtain and serve a subpoena to appear if a witness will not (or cannot, because of employment, illness, etc.) appear voluntarily. Indeed, because of the uninformative allegations contained in the complaint, it may only be at trial after the plaintiff presents his prima facie case that the tenant learns that the action is based on, say, alleged breach of a covenant or condition. Under such circumstances, the tenant would literally have no time at all to locate and subpoena witnesses or assemble other relevant evidence.

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15 The experience of this amicus is that many of its clients, poor people, pay rent by money order or third party checks (the latter usually being welfare or social security checks). This is because their assets are too meager to justify maintaining a bank account.

Since, in essence, the Oregon statutes prevent a tenant from preparing an effective defense on even the prima facie elements of an eviction action, it constitutes a denial of due process.[16]

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16 The immediate effect of the judgment against a tenant in an eviction action is to dispossess him of the property he is occupying. As noted at the outset, the right of possession alone is protected by due process. However, the judgment may have substantial collateral effects as well. California experience is instructive on this point. For instance, the judgment may have res judicata effects on issues litigated in the action. See, for instance, Turem v. Texaco, Inc. (1965), 236 Cal. App. 2d 758, 46 Cal. Rptr. 389 and Seidell v. Anglo-California Trust Co. (1942), 55 Cal. App. 2d 913, 132 P. 2d 12; where such a doctrine was applied. Another line of California cases holds more or less to the contrary. See, e. g., Cheney v. Trauzettel (1937), 9 Cal. 2d 158, 69 P. 2d 832; Haase v. Lamia (1964), 229 Cal. App. 2d 654, 40 Cal. Rptr. 518. Oregon law may be silent on this point, but the California cases indicate the possibility that an eviction judgment may ultimately be used as a bar in subsequent litigation, involving more substantial issues, such as title to property or other major issues. Given such a possibility, the due process issues involved in an eviction action are much greater than appear at first glance, and only emphasize why a tenant or his attorney must have adequate time to fairly meet the issues involved.

Finally, as noted before, a continuance granted only as a matter of discretion is not sufficient to provide due process. But, Oreg. Rev. Stat. §105.140, the continuance statute, suffers an even graver defect. No continuance even as a matter of discretion, may be granted for more than two days unless a bond is posted. A tenant without ready cash (which may well be likely if the tenant already has paid his rent, and simply wants a chance to prove it) or, without the ability to obtain, immediately, sufficient sureties is, thus, denied any chance whatsoever to obtain adequate time to defend the eviction action. This, in itself constitutes a denial of access to the courts, and hence, a denial of due process as well as equal protection. (See Griffin v. Illinois (1956), 351 U.S. 12, reh. den. 351 U.S. 958; Smith v. Bennett (1961), 365 U.S. 708; Williams v. Oklahoma City (1969), 395 U.S. 458; Lee v. Habib (D.C. Ct. App. 1970), 424 F.2d 891, 898-902.)

(c) The Tenant Is Not Afforded Adequate Opportunity to Prepare a Defense Which as a Matter of Constitutional Law He Is Entitled to Assert.

If the sole or primary purpose of an eviction is racial discrimination, the tenant should be permitted to defend against such an eviction. See Shelley v. Kraemer (1948),

334 U.S. 1, in which this Court held that racially restrictive covenants could not be enforced in the courts. Similarly, in California, Abstract Investment Co. v. Hutchinson (1962), 204 Cal. App. 2d 242, 22 Cal. Rptr. 309, held that such a defense is constitutionally required to be permitted. Another defense which may be required to be allowed as a matter of constitutional law is existence of retaliatory motive in the eviction. See the suggestion to this effect in Edwards v. Habib (1968), 397 F. 2d 687, 130 App. D. C. 126, cert. denied (1969), 393 U. S. 1016. (See also Schweiger v. Superior Court (1970), 3 Cal. 3d 507, 90 Cal. Rptr. 729, 476 P. 2d 97.)

Preparation of a defense based on racial (or other constitutionally prohibited) discrimination typically involves substantial preparation since much of the proof may have to be circumstantial. It is unlikely that the landlord will admit his motive in court. The tenant would be required to establish that despite prima facie compliance with Oregon statutory requirements for possession, the landlord is not entitled to possession because of his motives. The lack of opportunity for discovery would require the tenant to prepare on every major issue involved in such a defense, since there would be no way of narrowing the issues to those which are genuinely in dispute. For example, this may even require subpoenaing witnesses to authenticate written communications of the plaintiff which might help establish the discriminatory motive, when, through discovery, the authenticity of such documents might be admitted.

The Oregon eviction procedure places a herculean task on a tenant who believes he is being discriminated against. With a right to no more than two days to prepare a defense, in most instances even a landlord motivated by a discriminatory motive will prevail. This reason alone is sufficient to demonstrate that the time permitted to prepare for trial under the Oregon eviction statute is a denial of due process.

(d) The Tenant Is Not Afforded Adequate Opportunity to Raise Affirmative Defenses Which May Ultimately Be Accepted as a Matter of State Law.

While various states have adopted a summary procedure to facilitate evictions, the law dealing with such procedures has rarely been static and inflexible. For example, California has long had a summary procedure for evictions. Early California law (see, e.g., Arnold v. Krigbaum (1915), 169 Cal. 143, 146 Pac. 423) was quite rigid, apparently admitting of no affirmative defenses. This law has been subject to continuous modifications. Thus, in 1924, the case of Schubert v. Lowe, 193 Cal. 291, 223 Pac. 550, allowed equitable defenses to be raised. In 1962, Abstract Investment Co. v. Hutchinson, supra, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309, permitted defenses based

on racial discrimination. In 1970, Schweiger v. Superior Court, supra, 3 Cal. 3d 507, permitted defenses based on retaliatory motive. Further, if other state decisions are any measure, other defenses may be eventually permitted in California. See, for instance, Javins v. First National Realty Corp. (D. C. Ct. App. 1970), 428 F. 2d 1071, cert. denied (1970), 400 U. S. 925; Lemle v. Breeden (1969), 51 Haw. 426, 462 P. 2d 470; and Reste Realty Corp. v. Cooper (1969), 53 N. J. 444, 251 A. 2d 268 (habitability as a defense); Longenecker v. Hardin (Ill. App. Ct. 1970), ___ Ill. 2d ___, 264 N. E. 2d 878 and Brown v. Southall Realty Corp. (D. C. Ct. App. 1969), 237 A. 2d 834, cf. Shephard v. Lerner (1960), 182 Cal. App. 2d 746, 6 Cal. Rptr. 433 (illegality of lease as a defense). This amicus at present is representing client in . . . . . cases on appeal in California state courts involving both habitability and illegality.

Amicus does not maintain in connection with this case that all of the defenses outlined are constitutionally required. Rather, this amicus submits that the Oregon procedure, requiring trial on the merits in as short a time as two days is so draconian that a tenant in Oregon would not have a fair opportunity to raise any of these issues so that the Oregon courts can fairly decide if any of the defenses should be permitted. As the Oregon statute now reads, any case attempting to present any one of these issues is likely to be rendered moot, or be so badly presented as to its factual basis, because of insufficient time to prepare,

as to render a considered decision on the merits unlikely. Thus, in this respect, as well as the other respects outlined above, the Oregon eviction procedure constitutes a denial of due process.

C. CONCLUSION

For the numerous reasons outlined above, Oreg. Rev. Stat. §105. 135, especially when construed in light of Oreg. Rev. Stat. §§105. 125 and 105. 140, simply do not give a tenant time to adequately prepare to defend his right to possession of the property (usually his residence) in question. The issues, and the problems of adequate proof, are far more complex even in a prima facie case than the court below has suggested. Only a very resourceful and lucky tenant could possibly be prepared to defend such an action adequately. The fact that some tenants may have no defense does not justify taking away the opportunity to adequate notice and time to prepare for those who may have a defense. To hold to the contrary is to prejudge such cases. Further, it would be contrary to the holdings of the various cases (such as Mullane) discussed at length herein. Therefore, this amicus submits that the Oregon eviction procedures, respecting the amount of time allowed to prepare a defense, and in particular Oreg. Rev. Stat. §105. 135, must be held to be unconstitutional as constituting a denial of due process.

II

CALIFORNIA UNLAWFUL DETAINER STATUTES

California's statutes providing for summary proceedings for a landlord to obtain possession of rented real property (Calif. Code Civ. Proc. §§1161-1179(a)) apply, as do the Oregon statutes, where a tenant continues in possession after a lease has expired (Calif. Code Civ. Proc. §1161, subd. 1; see Oreg. Rev. Stat. §105.115(2)) after failing to pay the rent (Calif. Code Civ. Proc. §1161, subd. 2; see Oreg. Rev. Stat. §105.115 (1)); after failing to perform conditions of the lease (Calif. Code Civ. Proc. §1161, subd. 3; see Oreg. Rev. Stat. §105.115(2)); and after receiving written notice to vacate the premises (Calif. Code Civ. Proc. §1161, subd. 5; see Oreg. Rev. Stat. §105.115(2)). [17]

Where there are no specific grounds to evict a tenant, the tenant is entitled to 30 days' written notice to vacate before the landlord may bring an action in unlawful detainer (Calif. Civ. Code §1946; cf. Oreg. Rev. Stat. §§91.060 - 91.080).

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17 In addition, the unlawful detainer statutes may be used by the purchaser at an execution, mortgage foreclosure, or a trustee's sale to evict the former owner (Calif. Code Civ. Proc. §1161a); and where a tenant sublets contrary to the terms of the lease, or commits acts of waste upon the rented or leased premises (§1161, subd. 4).

The landlord-plaintiff must file a written complaint in which, unlike the Oregon counterpart, the plaintiff may seek recovery both of possession of the premises and of money damages (Calif. Code Civ. Proc. §1166; cf. Oreg. Rev. Stats. §105.145). The summons and complaint, as in Oregon, must be served in the same manner as in any other action (Calif. Code Civ. Proc. §§1167, 415.10, et seq.; see Oreg. Rev. Stats. §105.135). An unlawful detainer complaint (but see Oreg. Rev. Stats. §105.125) must be verified and pleaded with specificity (Calif. Code Civ. Proc. §1166). The complaint must allege compliance with statutory notice requirements, the grounds on which the plaintiff bases his claim of right to possession (see, e.g., Iburg v. Fitch (1881), 57 Cal. 189, 192; Hinman v. Wagnon (1959), 172 Cal. App. 2d 24, 27, 341 P. 2d 749), and that the relationship of landlord and tenant exists (Fredericksen v. McCosker (1956), 143 Cal. App. 2d 114, 116; 299 P. 2d 908), in addition to the allegations required under Oregon law, that is, a description of the property, the defendant's possession of the property, and the plaintiff's right to possession of the property. (See generally, Arnold v. Krigbaum, supra, 169 Cal. 143.) The defendant-tenant must file a written pleading within three calendar days after service of the summons upon him (Calif. Code Civ. Proc. §§12, 1167), while in all other civil proceedings, the defendant is permitted thirty days within which to file a responsive pleading (Calif. Code Civ. Proc. §412.20; cf. Oreg. Rev. Stat. §15.140(2) [10 days]).

The defendant-tenant is permitted to "answer or demur" to the landlord's complaint (Calif. Code Civ. Proc. §1170).[18] Although "answer" usually includes counterclaims and affirmative defenses (Calif. Code Civ. Proc. §437), Code of Civil Procedure §1167 has been construed to prohibit raising cross-complaints or counterclaims (see, e.g., Schubert v. Lowe, supra, 193 Cal. 291, 294-295; and Turem v. Texaco, Inc., supra, 236 Cal. App. 2d 758, 763), or any affirmative defenses other than certain equitable defenses (see generally, Schubert v. Lowe, supra, and Union Oil Co. of Cal. v. Chandler (1970), 4 Cal. App. 3d 716, 721-723, 84 Cal. Rptr. 756), such as racial discrimination (Abstract Investment Co. v. Hutchinson, supra, 204 Cal. App. 2d 242, 248-249), or retaliatory eviction (Schweiger v. Superior Court, supra, 3 Cal. 3d 507, 512-513).[19]

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18 The defendant may also file a motion to quash the summons on grounds of lack of jurisdiction (Calif. Code Civ. Proc. §418.10).

19 Where the basis of the complaint is the tenant's failure to remove after being notified that the plaintiff has obtained title to the property under an execution, mortgage foreclosure, or trustee's sale (see Calif. Code Civ. Proc. §1161a), the tenant is permitted to challenge only the lawfulness of the sale proceedings; he cannot challenge the lawfulness of the proceedings which led to the sale (Cheney v. Trauzettel, supra, 9 Cal. 2d 158, 160). (See ante fn. 16.)

In brief, with certain exceptions, the tenant is limited in his answer to a denial of the relevant allegations in the landlord-plaintiff's complaint.

Unlawful detainer actions are entitled to precedence over all other civil actions (Calif. Code Civ. Proc. §1179a). However, unlike the Oregon statutes which provide for a trial within two to four days after the summons is served (Oreg. Rev. Stat. §105.135), the actual time to trial in California will vary depending upon the number of filings of actions entitled to calendar preference in the particular municipal court judicial district involved, and the extent of pretrial motions and discovery proceedings.

If the landlord prevails at the trial, and has sought restitution of the premises, the court is required to order restitution and, as noted, to award money damages resulting from the unlawful detainer (contrast Oreg. Rev. Stat. §105.155), and may award treble the actual damages (Calif. Code Civ. Proc. §1174) if the withholding is wilful, deliberate and intentional (Whipple v. Haberle (1963), 223 Cal. App. 2d 477, 485, 36 Cal. Rptr. 9).

If the plaintiff-landlord obtains a writ of restitution in the unlawful detainer action, he is entitled to have the premises restored to him by the sheriff or marshal, who serves the writ of restitution. The tenant must vacate the premises within five days after the writ is served (Calif. Code Civ. Proc. §1174). In contrast, in Oregon, the physical eviction is

apparently effected immediately. (See Oreg. Rev. Stat. §105.155.) If the tenant fails to move within five days, the enforcing officer removes the tenant from the premises and the landlord is required to store the tenant's property remaining on the premises for a period of 30 days (Calif. Code Civ. Proc. §1174). During that period, the tenant may redeem his property upon payment of reasonable storage costs (Calif. Code Civ. Proc. §1174).[20]

Respectfully submitted,

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20 The additional requirement in Calif. Code Civ. Proc. §1174, that the tenant pay the amount of the judgment rendered in favor of plaintiff in order to redeem his property was held unconstitutional in Gray v. Whitmore (1971), 17 Cal. App. 3d 1, 27, because, inter alia, the section discriminated against tenant judgment debtors in denying them the opportunity to assert claims of exemption permitted all other classes of judgment debtors. (See Calif. Code Civ. Proc. §§690-690.50.)